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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

VOLKSWAGEN OF AMERICA, INC. and
VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONERS,

v.

AMPARO HERNANDEZ-GOMEZ, RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recently recodified at 49 U.S.C. §§ 30101-30169), preempts a state common-law standard that conflicts with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208.

RULE 29.1 STATEMENT

Petitioner Volkswagen AG (sued as Volkswagenwerk Aktiengesellschaft (VWAG)), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. Petitioner Volkswagen of America, Inc. is a wholly owned subsidiary of VWAG and has issued no publicly traded shares. Other major subsidiaries and affiliates of VWAG in which it has a substantial interest include:

AUDI AG
AUTOGERMA S.p.A.
Autolatina Argentina S.A.
Autolatina Brasil S.A.
Autolatina Comercio, Negocios e Participacoes Ltda.
Coordination Center Volkswagen S.A.
Europcar International S.A.
Financiera Seat, S.A.
InterRent-Europcar Autovermietung GmbH
Seat Leasing GmbH
Seat Motors International B.V.
Seat Kredit Bank GmbH
Shanghai-Volkswagen Automotive Company
Sociedad Espanola de Automoviles de
TAS Tvornica Automobila Sarajevo GmbH
Turismo, S.A.
V.A.G. France S.A.
V.A.G. Financement S.A.
V.A.G. Sverige AB
V.A.G. Transport GmbH & Co. OHG
V.A.G. Bank GmbH
V.A.G. LEASING GmbH
Volkswagen of Nigeria Ltd.
Volkswagen Canada Inc.
Volkswagen Investments Ltd.
Volkswagen International Finance N.V.

Volkswagen Bruxelles S.A.
Volkswagen Audi Nippon K.K.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen of South Africa (Pty.) Ltd.
VOTEX GmbH
VW Credit, Inc.
VW-GEDAS & Co. Projektmanagement OHG

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PETITION FOR A WRIT OF CERTIORARI

Volkswagen of America, Inc., and Volkswagen AG (sued as Volkswagenwerk Aktiengesellschaft) (collectively Volkswagen) respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Arizona in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona (App., *infra*, 1a-19a) is reported at 884 P.2d 183. The order of the Court of Appeals of Arizona declining to accept jurisdiction over respondent's petition for special action (App., *infra*, 20a) is unreported. The minute entry order of the Superior Court for Pima County, Arizona granting petitioners' motion for partial summary judgment (App., *infra*, 21a-22a) is unreported.

JURISDICTION

The decision and mandate of the Supreme Court of Arizona were entered on November 1, 1994 (App., *infra*, 1a-19a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act (Safety Act or Act), as codified at all times relevant to this case, provided in pertinent part:

15 U.S.C. § 1392

(a) Establishment

The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * * * *

(d) Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or State governments

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section

shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * * *

15 U.S.C. § 1397

* * * * *

(k) Continuation of common law liability

Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in pertinent part, are as follows:

49 U.S.C. § 30103. Relationship to other laws

(b) Preemption.—(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * * *

(e) Common law liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

STATEMENT

Invoking the Eleventh Circuit's decision in *Myrick* v. *Freuhauf Corp.*, 13 F.3d 1516 (11th Cir.), cert. granted, 115 S. Ct. 306 (1994) (No. 94-286), the Supreme Court of Arizona held in this case that the National Traffic and Motor Vehicle Safety Act does not preempt state common-law standards that conflict with Federal Motor Vehicle Safety Standards (FMVSS). This petition asks the Court to hold the case for review pending the disposition of *Myrick*, which raises virtually the same issues concerning the preemptive scope and effect of the Safety Act and FMVSSs on state common-law standards.

A. The Safety Act and FMVSS 208

Under the Safety Act, the National Highway Traffic Safety Administration (NHTSA), an agency within the Department of Transportation, promulgates safety standards for motor vehicles. 15 U.S.C. § 1392.[1] The Act mandates national uniformity in FMVSSs (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect,

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[1] For ease of reference we cite to the prior codification of the Safety Act, which was cited in the opinions and orders below.

> no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

A later provision of the statute adds a so-called "savings" clause: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).[2]

In explaining the need to preempt state law, the Senate Report on the Safety Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. Thus, "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." *Id.* at 4, 12, 1966 U.S.C.C.A.N. at 2712, 2720. As President Johnson remarked, the "alternative is unthinkable—50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

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[2] Although referred to as a "savings" clause by the court below (App., *infra*, 8a), this provision is not and was not intended to function as a true savings clause. See pages 17-19, *infra*; see also Brief of *Amicus Curiae* Product Liability Advisory Council, Inc., *Freightliner Corp. v. Myrick*, No. 94-286, at 15-23.

In exercising its authority under the Safety Act, NHTSA has promulgated numerous standards dealing with vehicle design and performance. At issue in this case is FMVSS 208, which addresses the "performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571.208, S1. In particular, for passenger cars manufactured between September 1, 1973 and September 1, 1986, FMVSS 208 provided three designated design "options" for safety restraint systems, as well as performance requirements for each option:

1. Complete passive protection for all crashes (S4.1.2.1);
2. Passive restraints for head-on crashes (S4-.1.2.2); or
3. Lap and shoulder belt protection systems with belt warnings (manual three-point seat belts) (S4.1.2.3).

Federal regulations thus gave a manufacturer the right to choose any one of these options for its vehicles.

The second option available under FMVSS 208 protects vehicle occupants "by means that require no action by [the] occupants * * *." 49 C.F.R. § 571.208, S4.1.2.2(b).[3] Indeed, the regulations expressly pro-

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[3] The second option in FMVSS 208 for passenger cars manufactured between September 1, 1973 and September 1, 1986 reads in full:

> S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—
>
> (a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.
>
> (b) At each front outboard designated seating position, meet the frontal crash protection requirements of

vide a fourth option: "a seat belt assembly that requires no action by vehicle occupants * * * may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." *Id.* at § 571.208, S4.5.3. In sum, a manufacturer could choose to comply with FMVSS 208 by installing passive seat belts that met the performance requirements of any of the designated restraint system options with no manually activated seat belts at all.

B. Factual and Procedural Background

Respondent Amparo Hernandez-Gomez was seriously injured when the 1981 Volkswagen Rabbit in which she was a passenger veered off the road, struck a drainage ditch, flipped over, and landed on its roof. App., *infra*, 2a. Respondent suffered a spinal cord injury that has rendered her a paraplegic. *Ibid.*

Respondent filed suit against Volkswagen in Arizona Superior Court alleging, among other things, that the "safety restraint system" in the Rabbit was negligently designed and manufactured and "failed to adequately protect her from a foreseeable rollover and actually enhanced her injuries." App., *infra*, 2a. The safety restraint system in the vehicle "consisted of a shoulder belt that automatically moved into place diagonally across the chest when the door was shut,

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S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

See also 49 C.F.R. § 571.208, S4.5.3.

a knee bolster, and a seat designed to prevent the occupant from submarining under the dashboard in a head-on collision." *Ibid.* "Because it was designed to be fully automated, the system did not include a manual lap belt." *Ibid.* Respondent alleged that the absence of a manually activated lap belt made the vehicle defective and unreasonably dangerous. *Ibid.*

Volkswagen moved for partial summary judgment, contending that the passive restraint system in the Rabbit met the requirements for the second design option in FMVSS 208. The Superior Court agreed, concluding that the vehicle's passive restraint system "complied with the Federal Motor Vehicle Safety Standards, particularly FMVSS 208 and 209" and that therefore respondent's "common law claim attempting to impose civil liability on [Volkswagen] based solely on the failure to provide a lap belt is impliedly preempted" by the Safety Act and NHTSA regulations. App., *infra*, 21a.

The Arizona Court of Appeals declined jurisdiction over respondent's petition for "special action" to review the trial court's order. App., *infra*, 20a. The Arizona Supreme Court then granted review to consider "whether an automobile manufacturer can be liable under state tort law for a product design defect when that design meets Safety Act standards." *Id.* at 3a.

C. The Arizona Supreme Court's Decision

The Arizona Supreme Court sitting en banc reversed the Superior Court's order granting Volkswagen's motion for summary judgment. The court assumed for purposes of its decision that the passive restraint system in the 1981 Volkswagen Rabbit complied fully with the second option in FMVSS 208 for passenger cars manufactured between 1973 and 1986.

App., *infra*, 7a. The court nonetheless held that the Safety Act neither expressly nor impliedly preempted state common-law standards that conflict with FMVSS 208.

Construing the preemption and "savings" clauses of the Safety Act, the Arizona Supreme Court found the statutory text "quite clear." App., *infra*, 9a. "State regulatory action that conflicts with the Safety Act is prohibited, but state common-law tort claims are saved and survive. Textually the two provisions have clear and unambiguous meaning. Further we *presume* against preemption of state common-law and refuse to find preemption absent an explicit textual statement of legislative intent." *Ibid.* Thus, the court concluded that the tort claim in this case was "expressly not preempted." *Ibid.*

In addition, the Arizona Supreme Court declined to follow the long line of federal circuit court decisions finding that FMVSS 208 impliedly preempted "state common-law tort claims against carmakers for not installing airbags in their cars." App., *infra*, 10a.[4] The court acknowledged that, in light of these

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[4] Citing *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). A number of State appellate courts reached the same result. See, *e.g.*, *Nissan Motor Corp.* v. *Superior Court*, 261 Cal. Rptr. 800 (Ct. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (N.Y. 1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 487 U.S. 1236 (1988).

decisions, it "might have been constrained to * * * find implied preemption of a class of state common-law actions, notwithstanding our reading of the text and consequent reluctance to do so." The court avoided that result, however, by focusing on this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), which it interpreted to "cast[] an entirely different light on the issue of pre-emption." App., *infra*, 11a.

According to the Arizona Supreme Court, "*Cipollone* changed federal preemption analysis by limiting the preemptive reach of a federal statute to its express terms." App., *infra*, 11a-12a. The court relied for this remarkable conclusion on a short passage from *Cipollone* stating that

> "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions."

Id. at 12a (quoting *Cipollone*, 112 S. Ct. at 2618 (citations and quotation marks omitted)). The court below read this statement to "limit[] preemption analysis to the express statutory language." App., *infra*, 12a. Thus, "courts should avoid debating implied preemption if the text of the statute addresses preemption and thus reliably identifies congressional intent." *Ibid.*

In so construing *Cipollone*, the Arizona Supreme Court expressly relied on the Eleventh Circuit's decision defining the scope of Safety Act preemption in *Myrick*, 13 F.3d at 1522. See App., *infra*, 12a-13a.

The court below held that the Eleventh Circuit had correctly applied " '*Cipollone*'s clear instruction that when there is an express preemption provision we should not consider implied pre-emption.' " *Id.* at 15a (quoting *Myrick*, 13 F.3d at 1522).

Finally, in reversing the trial court's order entering partial summary judgment for Volkswagen, the Arizona Supreme Court concluded that "*Cipollone* requires this result and [we] are secure in the knowledge that our construction of this federal statute is not the last word." App., *infra*, 18a.

REASONS FOR GRANTING THE PETITION

By following the Eleventh Circuit's decision in *Myrick*, the Arizona Supreme Court has perpetuated the *Myrick* court's subversion of federal preemption law. First, the court below, like the Eleventh Circuit in *Myrick*, erroneously held that the Safety Act does not expressly preempt state common-law standards that conflict with a FMVSS. Second, the court below, like the Eleventh Circuit in *Myrick*, misinterpreted this Court's decision in *Cipollone* to mandate that there can be no implied preemption of state law when a federal statute contains an express preemption clause.

These rulings are plainly wrong. At the time respondent's automobile was manufactured, FMVSS 208 gave Volkswagen the option to install fully passive automatic safety belts with no manually activated lap belts. As the Solicitor General explained in his *amicus curiae* brief in *Wood* v. *General Motors Corp.*, cert. denied, 494 U.S. 1065 (1989), the Secretary of Transportation sought to "promote motor vehicle safety" through FMVSS 208 by "affirmatively * * * encourag[ing] manufacturers to use a *variety* of protection systems in their fleets."

U.S. Br. 12, 15 (emphasis in original). Such diversity was intended to "ensur[e] public acceptance of passive protection systems," "encourag[e] the development of new and improved technologies," and "enabl[e] [NHTSA] to acquire a more extensive data base upon which future regulatory decisions could be made." *Id.* at 12-13. Thus, FMVSS 208 was consciously designed to give manufacturers a choice among various passive restraint system designs, rather than to mandate one particular system.

In this case, as the trial judge found and the Arizona Supreme Court assumed, Volkswagen fully complied with FMVSS 208 by invoking option two, providing for passive safety restraints without a manual lap belt. See App., *infra*, 7a, 21a; see also *O'Bryan* v. *Volkswagen of America, Inc.*, 838 F. Supp. 319, 324 (W.D. Ky. 1992) (Volkswagen's two-point passive restraint system met requirements of second option of FMVSS 208). Indeed, in 1974, NHTSA expressly determined that Volkswagen's passive restraint system met the requirements of option two of FMVSS 208 without manually activated seat belts, concluding that "[o]ption two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's." 39 Fed. Reg. 3834, 3834 (1974). Since then, a long line of Secretaries of Transportation has approved (and lauded) the use of the automatic seat belt design in Volkswagen's passive restraint system. See, *e.g.*, 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34289, 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28999 (1984) (Secretary Dole).[5]

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[5] In early 1977, the Department of Transportation contracted with Volkswagen to manufacture 125,000 cars equipped

Respondents, however, seek to impose a state law standard on petiitoners that would *require* manually activated lap belts. This claim is plainly preempted because it is inconsistent with the optional approach taken in FMVSS 208 and would disrupt the federal government's considered policy by removing or restricting an option granted by federal law. See *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); Brief for the United States As *Amicus Curiae*, *Freightliner Corp.* v. *Myrick*, No. 94-286, at 28-29 ("Interference with that federally protected freedom of choice through state tort judgments would have conflicted with Standard 208"). Moreover, this proposed common-law standard would penalize use of a passive restraint system that was expressly approved and encouraged by NHTSA and the Department of Transportation.

Because the Arizona Supreme Court has decided an important issue of federal law in a way that conflicts with the rulings of numerous other federal and state appellate courts (see note 4, *supra*), its decision would normally warrant plenary review. However, because this Court already has agreed to review the Eleventh Circuit's decision in *Myrick*, which (although involving a different FMVSS) is infected by many of the same errors, we suggest that the Court defer consideration of this petition and dispose of it as appropriate in light of the decision in *Myrick*.

1. The Arizona Supreme Court refused to find implied preemption because of a single sentence in *Cipollone* stating that if a federal statute has an express preemption clause and if "that provision pro-

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with the system in a "demonstration program to exhibit the effectiveness of passive restraint systems." 42 Fed. Reg. 5071, 5071 (1977).

vides a 'reliable indicium of congressional intent with respect to state authority,' * * * 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." 112 S. Ct. at 2618 (citations omitted). The court below broadly interpreted this sentence to mean that the implied preemption doctrine is no longer applicable to statutes with express preemption clauses. App., *infra*, 12a-15a.

This holding cannot be reconciled with this Court's precedents. As a threshold matter, it is implausible that in one sentence the *Cipollone* Court intended to repudiate a long line of preemption decisions permitting (indeed, accepting) implied preemption arguments regarding statutes with express preemption clauses. See *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139-140 (1990); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-543 (1977).[6] Indeed, the Arizona Supreme Court's interpretation is contrary to this Court's decisions rendered both before and after *Cipollone*. See *Gade* v. *National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992); *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732 (1993); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993).

A careful reading of *Cipollone* reveals that implied preemption has *not* been abolished in *all* cases in-

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[6] The Arizona Supreme Court's interpretation of *Cipollone* is also at odds with the proposition that state laws conflicting with federal law are preempted "by direct operation of the Supremacy Clause," *i.e.*, without regard to whether the federal statute or regulation has a preemption clause. *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). By the same token, no presumption against preemption is applicable in deciding whether state law conflicts with federal law. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988).

volving a federal statute with an express preemption clause. Instead, *Cipollone* stands merely for the unremarkable proposition that because congressional intent is the touchstone of preemption analysis, implied preemption arguments might be barred where a statute's express preemption clause "provides a 'reliable indicium of congresional intent with respect to state authority.'" 112 S. Ct. at 2617, 2618 (citation omitted).[7]

For three reasons that were rejected without serious analysis by the court below, the Safety Act's preemption clause does not provide a reliable indication of congressional intent to preclude implied preemption of state laws that conflict with the federal scheme embodied in the Act. First, 15 U.S.C. 1392(d) does not purport to be an exhaustive description of the state authority that Congress meant to displace. Notably, this case involves preemption by federal regulation. Where the source of preemptive federal action is an administrative agency rather than Congress, it is unreasonable to expect a statutory express preemption provision to define the full scope of preemption required to ensure the supremacy of federal law. This is especially true here because the safety regulations were issued under a broad delegation of congressional power. See 15 U.S.C. §§ 1381, 1392(a), 1407.

Second, the Safety Act's preemption section does not provide a "reliable indicium" of Congress's preemptive intent because it does not reflect all of the

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[7] Indeed, the "reliable indicium" formulation predates *Cipollone*, having been used by this Court in *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282 (1982), and *Malone* v. *White Motor Corp.*, 435 U.S. 497, 505 (1978). This confirms that *Cipollone* did not change preemption law as the Arizona Supreme Court concluded.

available evidence of Congress's thinking. Section 1397(k) of the Act, for example, which provides that compliance with a safety standard "does not exempt any person from liability under common law," shows that Congress expected implied preemption to operate under the Safety Act. The section was added, in part, to prevent implied *field* preemption from entirely displacing state law, but Congress did not save state law claims from implied *conflict* preemption. See pages 19-20, *infra*.

Finally, a recent amendment to the Safety Act provides further evidence that the Arizona Supreme Court's conclusion on congressional intent is wrong. In reauthorizing the Act in 1991, Congress explicitly ratified implied preemption in directing NHTSA to amend FMVSS 208 to require airbags in all new motor vehicles. Congress recognized that several courts had held that tort suits based on the failure to install such passive restraints were impliedly preempted and that an "all airbag" amendment might be construed as disturbing those precedents. The 1991 amendment therefore specified that it

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Pub. L. No. 102-240, § 2508(d), 105 Stat. 1914, 2086 (1991). See H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. This legislation and its history show conclusively that Congress was aware of, and content with, the cases construing the Safety Act to allow implied preemption analysis in passive restraint litigation.

2. The Arizona Supreme Court's rejection of express preemption (App., *infra*, 9a, 17a-18a) is similarly inconsistent with many decisions of this Court. The court below held that common law claims did not fall within the preemption provision of the Safety Act because Congress failed to make explicit reference to state common law. App., *infra*, 17a n.17 ("the absence of a reference to common-law claims indicates that Congress did *not* intend preemption") (emphasis in original). This rationale was clearly repudiated by *Cipollone*, which held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of " 'requirement[s] or prohibition[s] * * * imposed under State law.' " See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J.). The *Cipollone* Court held that it made no difference that the preemption clause failed to refer to common law claims. See also *Easterwood*, 113 S. Ct. at 1737-1738.

In finding no express preemption, the Arizona Supreme Court also relied (App., *infra*, 17a) on the Safety Act's so-called "savings" clause, 15 U.S.C. 1397(k) (compliance with a FMVSS "does not exempt any person from any liability under common law"); see note 2, *supra*. The court held that this clause "explicitly shelters common-law claims from preemption." App., *infra*, 17a.

The title, text, structure, and legislative history of the "savings" clause demonstrate, however, that it was not intended by Congress to restrict the scope of express preemption. Instead, the narrow language of Section 1397(k), which refers to "[c]ompliance with any Federal motor vehicle safety standard," negates only an affirmative common-law defense of compliance

with a government standard. See generally Brief of *Amicus Curiae* Product Liability Advisory Council, Inc., *Freightliner Corp.* v. *Myrick*, No. 94-286, at 15-23 (discussing legislative history and background of Section 1397(k)).[8]

Moreover, the text of Section 1397(k) differs significantly from the language used by Congress both in the Safety Act and in many other statutes when it intended to restrict the scope of preemption. In the preemption section of the Safety Act, for example, Congress included two true savings clauses limiting the reach of federal preemption:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d) (emphasis added). Each of these clauses begins with the unambiguous and traditional saving language, "Nothing in this section shall be construed * * *." The savings clauses in virtually every other case decided by this Court have similar encom-

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[8] Section 1397(k) is not included in the Safety Act's preemption provision, Section 1392(d), but is located five sections later. While the title of the preemption provision is "Supremacy of Federal standards," the title of Section 1397(k) is "Continuation of common law liability," which makes no reference to preemption or federal supremacy.

passing language and not the narrow "compliance with" language of Section 1397(k).[9]

Finally, even if Section 1397(k) were a true savings clause, the court below nevertheless erred because it ignored this Court's precedents interpreting similar clauses in other statutes. This Court has consistently interpreted such clauses as indicating only Congress's intent to allow common law claims to proceed in areas *not* covered by federal regulation. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981); *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 130 (1915). Contrary to the Arizona Supreme Court's holding, the same interpretation should apply to Section 1397(k).

In particular, this Court has often warned that general savings clauses should not be construed in an indiscriminate fashion to allow common law actions to subvert a federal regulatory scheme. In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446

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[9] See, *e.g.*, *John Hancock Mut. Life Ins. Co.*, 114 S. Ct. at 525 (interpreting savings clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"); *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992) (interpreting savings clause of Federal Aviation Act, 49 U.S.C. § 1506, which states, "[n]othing * * * in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies"); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 505 (1978) (interpreting savings clause of 1958 Disclosure Act, 29 U.S.C. § 301, which states, "[t]he provisions of this Act * * * shall not be held to exempt or relieve any person from any liability * * * provided by any present or future law of * * * any State * * *").

(1907), for example, the Court held that a general savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*; see also *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-95 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986). Here, too, it would be perverse to attribute to Congress the intent to "save" common law claims that "would have frustrated the Secretary's policy judgment and would have an adverse effect on safety" (*Myrick* U.S. Br. 28).

3. Both the express and implied preemption issues decided by the Arizona Supreme Court—erroneously and in conflict with other courts—should be resolved by this Court in *Myrick* later this Term. Petitioners therefore respectfully request that this case be held for review following the disposition of these issues in *Myrick*. In the event that the Court rejects the reasoning of the Eleventh Circuit in *Myrick*,[10] the judg-

[10] In *Myrick*, the Court will consider the preemptive scope of FMVSS 121, which grants manufacturers an option whether to install antilock brakes on their trucks and trailers. The government has asserted in that case, however, that FMVSS 121 does not grant such an option, and it contrasts that standard with FMVSS 208, which it acknowledges expressly grants safety restraint options to manufacturers and preempts common-law claims. *Myrick* U.S. Br. 24-29. Should the Court in *Myrick* reject the Eleventh Circuit's flawed preemption analysis but affirm the judgment on the grounds suggested by the government—that FMVSS 121 does not grant a safety

ment in this case should be reversed and the case remanded for further consideration in light of the Court's decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Freightliner Corp.* v. *Myrick*, No. 94-286.

Respectfully submitted.

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option and therefore does not conflict with state common-law claims—the judgment in this case should nevertheless be reversed in light of the differences between FMVSS 121 and FMVSS 208, which are conceded by the government.

APPENDICES

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APPENDIX A

[Filed Nov. 1, 1994]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

Supreme Court No. CV-93-0202-PR

Court of Appeals No. 2 CA-SA 93-0046

Pima County No. 274471

AMPARO HERNANDEZ-GOMEZ,
Petitioner,

vs.

HON. JOHN S. LEONARDO, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Pima,
Respondent,

VOLKSWAGEN OF AMERICA, INC., A NEW JERSEY CORPORATION, AND VOLKSWAGENWERK AKTIENGESELLSCHAFT, A FOREIGN CORPORATION,
Real Parties in Interest.

Special Action from the Superior Court in Pima County
The Honorable John S. Leonardo, Judge

REVERSED AND REMANDED

OPINION

FELDMAN, Chief Justice

The court of appeals denied special action relief in this case and we granted review to consider an issue of first impression in this state: Does the National Traffic and

Motor Vehicle Safety Act (the Safety Act) preempt a state law tort action against a car manufacturer that did not incorporate a lap belt in its passive restraint system?

We have jurisdiction under Ariz. Const. art. 6, § 5(3) and Ariz. R. P. Spec. Act. 8.

FACTS AND PROCEDURAL HISTORY

The operative facts are few and undisputed. On November 6, 1989, Amparo Hernandez-Gomez (Plaintiff) was riding in the right front seat of a 1981 Volkswagen Rabbit when the driver briefly took his eyes off the road. Travelling between 30 and 35 miles per hour, the car veered off the road and ran down an embankment. It struck a drainage culvert, flipped over, and landed on its roof. Plaintiff's head and shoulders smashed against the car's roof causing a spinal cord injury that has left her paraplegic.

Plaintiff alleges that the design of the car's safety restraint system failed to adequately protect her from a foreseeable rollover and actually enhanced her injuries. The restraint system consisted of a shoulder belt that automatically moved into place diagonally across the chest when the door was shut, a knee bolster, and a seat designed to prevent the occupant from submarining under the dashboard in a head-on collision. Because it was designed to be fully automated, the system did not include a manual lap belt that arguably would have prevented Plaintiff from being thrown against the roof of the car. Plaintiff claims that the absence of a lap belt made the car defective and unreasonably dangerous to its occupants.

On January 15, 1993, Volkswagen of America and Volkswagenwerk Aktiengesellschaft (collectively VW) moved for partial summary judgment, arguing that the car's passive restraint system [1] complied with federal de-

[1] A passive restraint system protects the occupant "by means that require no action by vehicle occupants . . . ." 49 C.F.R. § 571.208 S4.1.2.2(b) (1988).

sign and performance standards, which required no lap belt. So finding, and concluding that the Safety Act pre-empted state tort law so that compliance with the Act insulated the manufacturer from common-law liability, the trial judge granted partial summary judgment in VW's favor on March 16, 1993.

Seeking relief from the trial court's order, Plaintiff brought a special action [2] before the court of appeals, which declined jurisdiction on April 20, 1993. This court then accepted review of the following issues:

> 1. Whether the trial court incorrectly interpreted and applied the principles of federal preemption set forth in the recent U.S. Supreme Court case of *Cipollone* so as to abrogate Plaintiff's right to bring an action to recover damages for injuries resulting from negligent and/or defective design.
>
> 2. Whether common law product liability actions brought in Arizona are preempted by the Safety Act or [Federal Motor Vehicle Safety Standards].

The fundamental question is whether an automobile manufacturer can be liable under state tort law for a product design defect when that design meets Safety Act standards.

DISCUSSION

A. The Safety Act and Its Standards

Congress passed the Safety Act (15 U.S.C. § 1381 *et seq.*) in 1966 "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." [3] Congress authorized the Secretary of Transportation to formulate safety standards to protect the motoring public against an unreasonable risk of injury due to "the design,

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[2] In Arizona, relief formerly obtained by writs of prohibition, mandamus, or certiorari is now obtained by "special action." Ariz. R. P. Spec. Act. 1.

[3] Former 15 U.S.C. § 1381.

construction or performance of motor vehicles . . . ." [4] The Secretary of Transportation delegated the duty of writing Federal Motor Vehicle Safety Standards to the National Highway Transportation Safety Administration (Safety Administration). 49 C.F.R. § 571.2. The federal safety standards appear at 49 C.F.R. §§ 571.1 to 571.302.

The relevant safety standards are "Occupant Crash Protection," 49 C.F.R. § 571.208 (Standard 208), and "Seat Belt Assemblies," 49 C.F.R. § 571.209. Since the inception of these standards, there has been a national controversy on the question of whether passive restraints such as airbags should be mandatory or optional. Standard 208 originally required nothing more than seatbelts in newly manufactured automobiles. The United States Supreme Court cited 32 Fed. Reg. 2415 as the primary source. *Motor Vehicle Mfgrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 34, 103 S. Ct. 2856, 2862 (1983). Responding to sporadic seatbelt use by the public and a high rate of traffic injuries and fatalities, in 1969 the Department of Transportation began requiring installation of passive restraints in new cars. *Id.* at 35, 103 S. Ct. at 2862.

The Safety Administration reviewed two kinds of passive restraint crash protection systems—airbags and automatic seatbelts. Keith C. Miller, *Deflating the Airbag Pre-emption Controversy*, 37 EMORY L. J. 897, 902 (1988). Over the next fifteen years, other passive restraint systems were proposed and rejected due to their unpopularity with the public or carmakers. In addition, changes in administrations and national priorities during these years brought a number of successors with different agendas to the position of Secretary of Transportation. As a result, about sixty rulemaking notices were issued that "imposed, amended, rescinded, reimposed, and now rescinded again" the requirement for car manufacturers

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[4] Former 15 U.S.C. § 1391(1). *See* text.

to install passive restraints. *Motor Vehicle Mfrs.*, 463 U.S. at 34, 103 S. Ct. at 2862.[5]

In effect since 1973, Standard 208 allowed manufacturers to choose one of three options for cars made between 1973 and 1986. Passive protection need not be by airbag but must meet specific Standard 208 criteria. By giving carmakers a choice of safety restraint options. Congress hoped to stimulate research, development, and competition. S. Rep. No. 1301, 89th Cong., 2d Sess. 1, 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2712. The element of choice is considered a central feature of the Safety Act's regulatory scheme. *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1123 (3d Cir.), *cert. denied*, 498 U.S. 853, 111 S. Ct. 147 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S. Ct. 1781 (1990).

The industry's reluctance to install airbags has led to numerous lawsuits against carmakers by people injured in automobiles not equipped with airbags. *See, e.g., Wood v. General Motors Corp.*, 865 F.2d 395, 400 (1st Cir. 1988) ("In addition to the present action, about two dozen other suits have been recently filed claiming that an automobile was defectively designed because it lacked passive [airbag] restraints."), *cert. denied*, 494 U.S. 1065, 110 S. Ct. 1781 (1990). The issue in those cases—whether, in light of the Safety Act options permitting but not requiring airbags, a manufacturer can be liable in a common-law action for not installing an airbag—parallels

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[5] The issue in *Motor Vehicle Mfrs.* concerned whether the Safety Administration's rescission of the passive restraint requirement was arbitrary and capricious and violated the Safety Act. By failing to consider an airbag-only option, the Court suspected the agency was acquiescing to an industry preference for the automatic seatbelt design. 463 U.S. at 49, 103 S. Ct. at 2870. Finding that the purpose of the Safety Act was to arouse an automobile industry inert to safety concerns, the Court remanded for the agency's reconsideration. *Id.* at 57, 103 S. Ct. at 2874.

the issue here. In the present case, instead of an airbag claim, Plaintiff sued the carmaker for failing to install a lap belt even though the Safety Act allegedly permitted the option of a two-point passive restraint system without a manual lap belt. We recognize, as did the Supreme Court and the Safety Administration, that airbags and three-point seatbelts significantly reduce traffic accident injuries and fatalities.[6]

B. The Car's Crash Protection System—Compliance with Standards

For this 1981 model car, VW attempted to comply with one of the available options by designing a belt-type passive restraint system for the front-seat occupants. The design used an automatic two-point shoulder belt with no lap belt. In its motion for summary judgment, VW offered evidence that this restraint system satisfied Standard 208 and that a lap belt was not required to comply with option two. Finding that Plaintiff did not produce evidence sufficient to raise a genuine issue of material fact on the question of compliance, the trial judge held that the car's passive restraint system satisfied Standard 208. The court concluded, therefore, that the Safety Act preempted Plaintiff's claim and granted VW's motion for summary judgment.[7]

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[6] *Motor Vehicle Mfrs.*, 463 U.S. at 34-35, 103 S. Ct. at 2862; United States Department of Transportation, National Safety Belt Usage Program, *Progress and Assessment Report on the National Safety Belt Usage Program* 2 (Sept. 1983) (estimating that lap belt use could reduce fatalities and serious injuries by 50 to 60 percent each year).

[7] An identical claim was made against VW in *O'Bryan v. Volkswagen of America, Inc.*, 838 F. Supp. 319 (W.D. Ky. 1992). Based on the Safety Administration's interpretations of its requirements, the district court in *O'Bryan* similarly found that VW's two-point passive restraint system met the requirements of Standard 208's option two and that the federal standard preempted state law damage claims. *Id.* at 324.

For purposes of this opinion, we assume that the trial judge correctly decided that the design in question complied with option two. Thus we address only the preemption issue.

C. Preemption and Savings Clauses and Federal Preemption Doctrine

When this court accepted jurisdiction, the relevant sections of the Safety Act appeared at 15 U.S.C. § 1392(d) (1994 supp.) (preemption clause) and § 1397(k) (1994 supp.) (savings clause). Congress revised the language and recodified these subsections at 49 U.S.C. § 30103(b) and (e), respectively, effective July 5, 1994. Because the parties' briefs referred to the prior sections and language, we use those citations. The original preemption clause provided in relevant part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, *no State or political subdivision of a State shall have any authority either to establish, or to continue in effect,* with respect to any motor vehicle or item of motor vehicle equipment *any safety standard applicable to the same aspect of performance* of such vehicle or item of equipment *which is not identical to the Federal standard.* Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

15 U.S.C. § 1392(d) (1992 supp.) (emphasis added).[8]

[8] We note two obvious effects of the revised language in 49 U.S.C. § 30103(b). First, whereas the old provision was phrased to prohibit states from continuing or enacting nonidentical regulatory standards, the new provision permits states to enact standards only if they are identical to the federal standards. And second, subordinate clauses have been rearranged in the new preemption clause to make the text more readable. We do not consider these changes substantively significant.

The applicable savings clause provided:

> Continuation of common law liability
>
> *Compliance* with any Federal motor vehicle safety standard issued under this subchapter *does not exempt any person from any liability under common law.*[9]

15 U.S.C. § 1397(k) (1992 supp.) (emphasis added).

The Supremacy Clause allows Congress to make laws that supersede state law.[10] Federal regulations may also preempt state law. *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375 (1985). In determining whether a federal law preempts a state's statute, the "sole task is to ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S. Ct. 683, 689 (1987). However, there is a strong presumption against preemption of a state's police power. *Cipollone v. Liggett Group, Inc.*, 505 U.S. ——, 112 S. Ct. 2608, 2617 (1992). Preemption analysis:

> [S]tart[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessar-

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[9] Because federal doctrine generally avoids establishing a federal common law, we take the phrase "common law" in the 1966 statute as a reference to state common law. *See Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640, 101 S.Ct. 2061, 2067 (1981) (noting that there is no federal common law except in a "few and restricted" instances.).

[10] U.S. Const. art. VI, cl. 2 states:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

> ily by the courts. But when Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Jones v. Rath Packaging Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977) (citations and quotes omitted).

Whenever possible we must divine intent from statutory text. *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983) ("The language of a statute is the most reliable evidence of its intent, and in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."). The text seems quite clear. Obviously, the preemption and savings clauses must be construed together. State regulatory action that conflicts with the Safety Act is prohibited, but state common-law tort claims are saved and survive. Textually, the two provisions have a clear and unambiguous meaning. Further, we presume against preemption of state common-law and refuse to find preemption absent an explicit textual statement of legislative intent. *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 273, 872 P.2d 668, 677 (1994) (Arizona statute does not preempt state court jurisdiction over bad faith claims against workers' compensation carriers). Were we writing on a clean slate in 1966—before other courts began strirring the waters of the Safety Act's preemptive reach—we would find the claims asserted in this case expressly *not* preempted and would effectively end the opinion at this point.

However, unlike *Hayes*, we deal not with a state statute but with an act of Congress. Thus, federal rather than state law must govern. Further, this is 1994 and we do not write on a clean slate. Since 1966, many courts have considered preemption under the Safety Act, often find-

ing preemption on the issue before us. Although the United States Supreme Court has not decided the issue and we therefore are not constrained by binding authority, respect for federal circuit opinions interpreting a federal statute obviously compels us to consult federal authority.

Notwithstanding the language of the savings clause, a number of federal courts have found *implied preemption* of state common-law tort claims against carmakers for not installing airbags in their cars. They found the Safety Act's preemption clause ambiguous because it did not expressly place such claims outside preemptive reach. *Wood*, 865 F.2d at 412.[11] The courts determined that a state law damage award could effectively establish a standard not identical to the federal standard for the same feature and thus thwart the intended flexibility of the options allowed by Standard 208. These no-airbag claims would conflict with congressional intent to give manufacturers a choice of restraint system designs. *Taylor*, 875 P.2d at 827 ("[A] state common law rule . . . would, in effect, remove the element of choice authorized in Safety Standard 208 [and] would frustrate the federal regulatory scheme."); *see also Pokorny*, 902 F.2d at 1123; *Wood*, 865 F.2d at 408.

Each of these courts concluded that the Savings Clause does not preserve common law damage actions that would subvert federal objectives and methods. One district judge concluded that "courts have declared, almost with one voice, that the Safety Act *impliedly* preempts [conflicting common-law] liabiliity, *even though its express preemption clause may be insufficient to accomplish the task.*" *Gills v. Ford Motor Co.*, 829 F. Supp. 894, 896 (W.D.

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[11] *See also Pokorny*, 902 F.2d at 1126; *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065, 110 S. Ct. 1781 (1990); *Taylor*, 875 F.2d at 827. Cf. *Perry v. Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (implied preemption only where there is an actual *conflict* with the "objectives and methods of the federal scheme").

Ky. 1993) (first emphasis in original; second emphasis added).

Thus, consulting federal decisions in the years following enactment of the Safety Act, we might have been constrained to adopt the view of the federal courts and find implied preemption of a class of state common-law actions, notwithstanding our reading of the text and consequent reluctance to do so. *Hayes*, 178 Ariz. at 273, 872 P.2d at 677. However, the Supreme Court decision in *Cipollone* casts an entirely different light on the issue of preemption.

In *Cipollone*, the plaintiff sued a cigarette manufacturer for wrongful death of his mother. He claimed that the manufacturer breached express warranties contained in advertising, failed to warn consumers about the hazards of cigarette smoking, fraudulently misrepresented the hazards of smoking, and conspired to withhold from the public medical information about smoking. 112 S. Ct. at 2613. The Court considered whether these claims could survive the Federal Cigarette Labeling and Advertising Act of 1965,[12] which required a specific and conspicuous health warning on all cigarette packages sold in this country. The question at issue was essentially that presented in this case: Did that Act's preemption provision—barring states from imposing other warning requirements related to advertising or promoting cigarettes—bar the plaintiff's common-law tort claims?

The Supreme Court partly reversed the lower court's ruling that the Labeling Act preempted the state law claims. *Id.* at 2625. Finding that the preemptive scope of the Labeling Act is governed entirely by its express language, the Court held that the preemption provision only prohibits state lawmakers from mandating particular warning labels. *Cipollone* changed federal preemption

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[12] This act was succeeded by the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340.

analysis by limiting the preemptive reach of a federal statute to its express terms:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions . . . . Therefore, we need only identify the domain expressly preempted by each of these sections.

Id. at 2618 (citations and quotes omitted). *Cipollone* thus limited preemption analysis to the express statutory language by holding that a correlative federal regulatory requirement "does not by its own effect foreclose additional obligations imposed under state law." *Id.* In short, courts should avoid debating implied preemption if the text of the statute addresses preemption and thus reliably identifies congressional intent.

In the wake of *Cipollone*, courts have narrowed their evaluation of a statute's preemptive reach. Almost all the federal circuits have addressed federal preemption since *Cipollone* and now consider expression of preemption in a statute's text the "reliable indicium of congressional intent," no longer divining implied preemption. *See Myrick v. Fruehauf Corp.*, 13 F.3d 1516, 1522 (11th Cir. 1994) (citing cases[13] following *Cipollone*'s instruction that preemption analysis should be limited to the

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[13] *Draper v. Chiapuzio*, 9 F.3d 1391 (9th Cir. 1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 345, 358 (8th Cir. 1993); *Toy Mfrs. of Am., Inc. v. Blumenthal*, 986 F.2d 615, 623 (2d Cir. 1992); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir.), *cert. denied*, 114 S. Ct. 291 (1993); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1420 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 86 (1993); *American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154 (7th Cir. 1992); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 823 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

"domain expressly pre-empted by each of those sections"), *cert. granted*, 63 U.S.L.W. 3291 (U.S. Oct. 11, 1994) (No. 94-286).

Significantly, since *Cipollone*, at least one circuit court has reevaluated its previous holding. In *Taylor*, a pre-*Cipollone* case acknowledging no express common-law preemption, the Eleventh Circuit held that a common-law tort claim based on a defect in a design complying with the Safety Act's standards was impliedly barred. After *Cipollone* a different panel of the same court ruled to the contrary in *Myrick*, a case concerning a liability claim against truck and trailer manufacturers for failing to install anti-lock brakes. 13 F.3d at 1521-22. Finding the plaintiffs' tort claims not expressly preempted by the Safety Act's preemption clause and expressly protected by the savings clause, *Myrick* partly overruled *Taylor* by following "*Cipollone*'s clear instruction that when there is an express preemption provision we should not consider implied pre-emption . . . ." *Id.* at 1522. At least one state appellate court has followed *Myrick*'s lead by finding no preemption of an airbag liability claim. *Loulos v. Dick Smith Ford Inc.*, 882 S.W.2d 149 (Mo. Ct. App. 1994), *transfer denied* (the savings clause is a reliable indicium of congressional intent to save a common-law airbag claim).

Not all post-*Cipollone* no-airbag cases agree that these claims survive. One federal district court stated that:

> The mere presence of express preemption language does not necessarily prohibit an implied preemption analysis under the *Cipollone* rule . . . . A court may . . . search a statute for implied preemptive intent if that statute's express language fails to provide a "reliable indicium" of the legislature's preemptive wishes.

Gills, 829 F. Supp. at 897-98 (citations omitted). Finding that a common-law claim could have a conflicting

regulatory effect if it would establish a state safety standard different from the federal standard but covering the same aspect of performance, the court granted partial summary judgment for the defendant carmaker on the grounds that the Safety Act had impliedly preempted the airbag claim because such a claim would interfere with the manufacturer's approved options. *Id.* at 899. The court, however, distinguished airbag claims from common-law claims "that a safety device [presumably including a seatbelt assembly], though in compliance with minimum federal standards, failed to meet higher performance requirements." *Id.* Although a claim based on the absence of an airbag would effectively reduce a carmaker's choice of Standard 208 options, a claim based on a defective though federally approved design would not. The latter claim would force the carmaker to either satisfy a higher standard for its system design or face the risk of damages claims, a result not necessarily in conflict with the inherent flexibility of the Safety Act.[14]

Another district court has concluded that the preemption clause "*expressly* preempt[s] all state tort claims that are 'applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.'" *Montag v. Honda Motor Co., Ltd.*, 856 F. Supp. 574, 577 (D. Colo. 1994) (emphasis added). On the other hand, the court held that the "savings clause does not express any specific congressional intent to preserve state common law actions" that effectively circumvent the preemption clause. *Id.* With all due respect, the district judge seems to suggest that Congress could not have meant what it said when in the savings clause it stated that compliance would "not exempt any persons from any liability under common law."

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[14] Presumably *Gills'* rationale would not recognize preemption of the claim asserted in the present case.

Like those pre-*Cipollone* opinions that ignored the explicit language of federal statutes while searching for unarticulated congressional motives, we believe the district court analyses in *Gills* and *Montag* are incorrect. *Cipollone* commands courts to follow a textual path in ascertaining a statute's meaning, making it unnecessary either to search for unarticulated legislative intent or engage in a balancing process that may result in a conclusion of implied preemption. As we read Justice Stevens' words in *Cipollone*, in which Congress addressed the preemption question, as in the Safety Act, preemptive reach is determined not by a search for unexpressed congressional intent but by the words of the text itself. Thus, the text provides "the reliable indicium of congressional intent" to preempt state authority. *Cipollone*, 112 S. Ct. at 2618. The application of that rule ends the "need to infer congressional intent to preempt state laws from the [other] substantive provision[s]" of the legislation. *Id.*; *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."). Thus, when the statute addresses pre-emption, its text defines preemptive reach and "implies that matters beyond that reach are not preempted." *Cipollone*, 112 S. Ct. at 2618.

For what it is worth, we believe that this rule is by far the best policy. If a legislative body wishes to pre-empt, it knows the language that will accomplish that result. *Taylor*, 875 F.2d at 824.[15] "If the legislature

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[15] As noted in *Taylor*, 875 F.2d at 824, examples of federal acts in which common-law claims are expressly preempted include the Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715a-17(d), -18(a) (1989) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301(a) (1982) (preempting rights "under the common law or statutes of any State,"

seeks to preempt a cause of action or to deprive the courts of jurisdiction, the law's text . . . should say so explicitly." *Hayes*, 178 Ariz. at 273, 872 P.2d at 677. Such a rule transfers the decision about preemption and its reach from the post-hoc speculation of lawyers to the forum where it should be argued: the legislature, where the competing interests may be reconciled *before* the statute is passed. *Id.*

D. Resolution

With the *Cipollone* rule in mind, we turn to the preemption issue before us. We find the Safety Act's text clear enough. The preemption clause itself indicates that Congress considered the issue of preemption. The text expressly precludes any state from establishing, or prescribing, a safety standard not identical to the same aspect of performance targeted by a federal standard. 15 U.S.C. § 1392(d), now 49 U.S.C. § 30103(b). A state can set a standard neither more nor less exacting. Arizona, of course, has not set any standard, let alone one that conflicts with the federal standard. Standing alone, § 1392(d) might not show a legislative intent to preempt only state-enacted regulatory safety standards. Arguably, it could have been construed to prohibit *any* form of state authority from interfering with the options permitted by federal law.[16]

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with common-law exceptions noted in other subsections); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a), (c)(1) (1985) (preempting "any and all State law," including "decisions, rules, regulations, or other State action having the effect of law").

[16] Even considering only the preemption clause, we do not believe such an analysis could survive *Cipollone*. Our reading of the preemption clause leads us to conclude that the legislative intent was to prohibit states from enacting any regulation that would conflict with the federal standards. It does not expressly preempt state courts from awarding tort damages for unreasonably defective designs, and therefore it would not preempt common-law tort claims.

Congress' inclusion of the savings clause unquestionably removes any doubt. The text of the savings clause explicitly shelters common-law claims from preemption, expansively providing that compliance with federal regulations "does not exempt [one] from *any* liability under common law." 15 U.S.C. § 1397(k) (codified as amended at 49 U.S.C. § 30103(e) (emphasis added). We find these words a reliably clear congressional mandate. The inescapable conclusion is that Congress considered the preemption issue, addressed it in the text of the legislation, and rejected preemption of state law tort claims like the one in this case. Finding preemption of this claim would violate the command of *Cipollone*. *See* 112 S. Ct. at 2618.

Thus, this case does not tempt us to speculate on unstated congressional intent or the Safety Act's implied preemptive reach. We conclude that common-law damage judgments are not preempted because (1) the text of the preemption clause addresses regulatory standards and does not reach or include common-law tort claims, and (2) the savings clause explicitly manifests a congressional intent to preserve common-law tort claims.[17] In addition, speculating that § 1392(d) might preclude conflicting common-law standards would effectively nullify the mandate that the Safety Act preempts no common-law liability. *United States v. Menasche*, 348 U.S. 528, 538-39, 75

[17] We reject the proposition that because the preemption clause makes no explicit reference to common-law claims, we are free to conclude that Congress meant to preempt them. On the contrary, the absence of a reference to common-law claims indicates that Congress did *not* intend preemption. We acknowledge that past decisions by the Supreme Court "have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 112 S. Ct. at 2620. But *Cipollone* admits that "the presumption against preemption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context." *Id.* at 2620-21. We view the savings provision in the Safety Act as another good reason for construing the phrase narrowly in this case.

S. Ct. 513, 520 (1955) (courts have a duty to give effect to every clause in a statute, if possible).

Thus, our analysis of preemption by the Safety Act ends with a reading of the text of the preemption clause and its companion, the savings clause. The two clauses act harmoniously to forbid states from enacting conflicting standards while allowing common-law tort actions.[18] We believe *Cipollone* requires this result and are secure in the knowledge that our construction of this federal statute is not the last word.

CONCLUSION

The Safety Act does not preempt Plaintiff's action for defective design of a federally approved restraint system. The Safety Act's savings clause expresses Congress' intent to allow state common-law claims against automobile manufacturers whose safety restraint systems comply with federal minimum performance standards but are unreasonably dangerous to consumers. Thus, the trial court erred in granting VW's motion for partial summary judgment. We vacate the order granting the motion and remand this case for further proceedings consistent with this opinion.

STANLEY G. FELDMAN
Chief Justice

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[18] Nor is such a result so unusual that one must conclude Congress could not have intended it. Indeed, it is the general rule of tort law that a design defect action is not precluded merely because the manufacturer complied with regulations. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue.").

CONCURRING:

JAMES MOELLER
Vice Chief Justice

ROBERT J. CORCORAN
Justice

THOMAS A. ZLAKET
Justice

FREDERICK J. MARTONE
Justice

APPENDIX B

[Filed Apr. 20, 1993]

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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2 CA-SA 93-0046
Department A

PIMA County Superior Court Cause No. 274471

AMPARO HERNANDEZ-GOMEZ,
Petitioner,

v.

THE HONORABLE JOHN S. LEONARDO, A JUDGE FOR THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA,
Respondent,

and

VOLKSWAGEN OF AMERICA, INC., A NEW JERSEY CORPORATION, and VOLKSWAGENWERK ANTIENGESELLSHAFT, A FOREIGN CORPORATION,
Real Parties in Interest.

ORDER

ORDERED: The court declines to accept jurisdiction.

Chief Judge Livermore and Judge Espinosa concurring.

DATED: April 20, 1993

/s/ Michael A. Lacagnina
MICHAEL A. LACAGNINA
Presiding Judge

APPENDIX C

ARIZONA SUPERIOR COURT
PIMA COUNTY

Case No. 274471

Date: March 16, 1993

Judge: HON. JOHN S. LEONARDO

AMPARO HERNANDEZ-GOMEZ

vs.

VOLKSWAGEN OF AMERICA, INC., *et al.*

MINUTE ENTRY

UNDER ADVISEMENT RULING:

Defendants' Motion for Partial Summary Judgment is Granted to the extent that Plaintiff Hernandez-Gomez claims that the 1981 Volkswagen was defective because it did not have a lap belt installed as part of its passenger restraint system. This judgment is based on the Court's conclusion as a matter of law that:

1. The automatic restraint system (VWRA) in the 1981 VW complied with the Federal Motor Vehicle Safety Standards, particularly FMVSS 208 and 209, and that

2. Plaintiff's common law claim attempting to impose civil liability on VW based solely on the failure to provide a lap belt is impliedly preempted by the National Traffic and Motor Vehicle Safety Act and its regulations. *Perry v. Mercedes Benz of North American, Inc.*, 957 F2d 1257 (5th Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F2d 1116 (3rd Cir. 1990).

Defendants' Motion for Partial Summary Judgment that Plaintiff's damages are to be measured at Mexican cost of care and services rather than at United States cost is Denied as the Court FINDS there exists a genuine issue as to material facts related to this motion. While there is uncertainty as to whether or not Plaintiff will ever be admitted as a resident of this country on a permanent basis, she has obtained medical treatment in this country on a regular basis since the injury and, given the proximity of her residence in Mexico to the border, it is reasonable to expect that she will continue to receive treatment in the United States indefinitely even if she continues to reside in Mexico.

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